IN THE

Supreme Court of the United States

No. 674.

OCTOBER TERM, 1928.

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY C. EVANS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO, THE VILLAGE OF MAUMEE, OHIO, AND THE VILLAGE OF WATERVILLE, OHIO, AND THE CITY OF TOLEDO, OHIO,

Appellants,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY,

Appellee.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division.

STATEMENT OF CLAIM AS TO JURISDICTION UNDER RULE No. 12 OF THIS COURT.

Appellants appeal to this court from a permanent injunction order declaring Sections 14178 to 14178-12, in-

clusive, of the General Code, passed May 11, 1927, by the general assembly of Ohio, 112 Ohio Laws, 360, 363, to be repugnant to and in contravention of the Constitution of the United States and enjoining the performance by an officer of the state of Ohio of duties imposed upon him by certain laws of that state, which injunction was granted by three judges in the District Court of the United States, southern district of Ohio, to appellee, pursuant to a bill in equity filed in said court on July 29, 1927 (Rec., p. 1). On September 24, 1927, the court, consisting of three judges, granted an application of the appellee for an interlocutory injunction prayed for pending a final hearing of the cause for permanent injunction (Rec., p. 200).

The cause thereafter came on for final hearing on the merits, pursuant to the issues joined by the several answers of appellants before Hon. Maurice H. Donahue, United States circuit judge of the sixth circuit, the Hon. Benson W. Hough and Hon. Smith Hickenlooper, district judges for the southern district of Ohio.

On September 7, 1928, said court, constituted as aforesaid, announced its written opinion (Rec., p. 184), finding in favor of the appellee, The Maumee Valley Electric Company, permanently enjoining the superintendent of public works and the director of highways and public works, a state officer, from the enforcement of such statutes on the ground that the statutes were unconstitutional. The superintendent of public works and director of highways and public works is an officer of the state of Ohio appointed pursuant to Sections 154-1, 154-3, 154-4, 154-40, 404, 411 and 412 of the General Code of Ohio.

The appellee in the bill of complaint set forth in detail the ownership by it of certain water rights evidenced by agreements and grants in certain leases to it or its predecessor from the state of Ohio, of which it was the assignee thereof, by virtue of which it claimed the right to take water from the Miami and Erie canal at the village of Maumee, and alleged that the superintendent of public works and director of the department of highways and public works of the state of Ohio, pursuant to the provisions of said act of the general assembly, would, unless restrained from so doing, drain the water out of the portion of the canal which is abandoned by the act.

Under the terms of the act such portion of the canal was abandoned, all leases of any character thereon were declared void within sixty days after its effective date and the canal property turned over to the superintendent of public works and director of the department of highways and public works of the state of Ohio for highway and park purposes.

On December 3, 1928, said court entered a final decree (Rec., p. 210), adjudging that said act of the general assembly of Ohio, in so far as it provided for cancellation and termination of the leases from the state of Ohio to appellee, and authorized and directed the appellant, the superintendent of public works and the director of the department of highways and public works of the state of Ohio, to drain the water from said canal prior to the expiration of the terms of said leases, was a taking of the property of the appellee in violation of and in contravention to provisions of the United States Constitution,

and enjoining the appellant, Harry J. Kirk, as superintendent of public works and director of the department of highways and public works of the state of Ohio as well as other appellants from in any way or by any means draining or, except by the plaintiff, causing or permitting to be drained from that portion of the Miami and Erie canal, or any part thereof, described as commencing at the guard lock, so-called, and otherwise known as lock No. 9 and lock No. 44 of said canal, and extending thence southwesterly over and along said Miami and Erie canal, including the full width of the bed and banks thereof as defined by Buchanan's survey, to and including the point or place where said canal joins with the Maumee river on the northwesterly side thereof and above or southwesterly from the Grand Rapids, Ohio, state dam in Providence township, Lucas county, Ohio, and being a part of that portion of said Miami and Erie canal as described and referred to in Section 1 of an act of the general assembly of Ohio, entitled "An act to abandon a portion of the Miami and Erie canal in Lucas county, Ohio, and to devote the same to highway and other purposes and to repeal all acts in conflict therewith," passed May 11, 1927, and found on pages 360 and 363 inclusive of Volume 112 of the laws of Ohio, any of the waters of said canal which, except for such draining, would and will be available to the plaintiff in this cause for its use to the amount provided and called for in plaintiff's said lease, agreement and grant expiring on December 19, A. D. 2004, as aforesaid; and from doing, or causing to be done, any act, matter or thing in any way or

by any means with respect to said Maumee river, or said part above described of said Miami and Erie canal as extending from said guard lock No. 9 to and including the point or place where said canal joins with said Maumee river, that would prevent or in anywise interfere with, or obstruct, the continuous flow into or throughout the part of said canal described as aforesaid, of any of the waters of or from said Maumee river or of said part of said canal which, except for such prevention, obstruction or interference, would and will be available to the plaintiff in this cause for its use to the amount provided and called for in plaintiff's said lease, agreement and grant expiring as aforesaid.

On December 20, 1928 (Rec., p. 216), defendants in said District Court (appellants here) filed a petition for appeal to this court, which was duly allowed by the District Court and an order issued accordingly fixing the amount of the appeal bonds (Rec., p. 219). Thereafter the District Court, by several orders, enlarged the time for the docketing of the appeal and the filing of the record thereof with the clerk of this court to February 16, 1929. On February 4, 1929, appellants docketed this cause and filed the record thereof with the clerk of this court.

Upon the statutory jurisdiction of this court to review this cause upon appeal, we call attention to Section 380, United States Code, Title 28, Section 380 (Judicial Code, Section 266, as amended), as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or exe-

cution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: **Provided, however,** that one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: **Provided,** that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order

> granting or denying, after notice and hearing, an interlocutory injunction in such case. * * * The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

In reference to the cases appealable to this court under the provisions of Section 266, Judicial Code, as amended, Mr. Justice Brandeis, in the case of In re Buder, 271 U. S., 461 (70 L. Ed., 1036) at page 465, directs attention to the purpose of a paragraph added at the end of Section 266, Judicial Code, by amendment, as follows:

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the District Court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

and then further adds:

> "As so amended, Section 266 also permits a direct appeal to this court from the final decree in those suits in which the hearing on an application for an interlocutory injunction is required to be before three judges."

In reference to cases reviewable in this court by direct appeal from the District Court, in the case of Clerk, et al. v. Poor, et al., 274 U. S., 54, in the headnote, it is said:

> "The final judgment of the District Court, three judges sitting, which dismisses the bill challenging the constitutionality of a state statute and seeking to enjoin its enforcement, is reviewable in this court upon appeal, under Judicial Code, Section 266, as amended by act of February 13, 1925, when an in-

terlocutory injunction has been applied for and a restraining order issued. (p. 556.)''

From the nature of the case, and it appearing that a state officer has been permanently enjoined from carrying out the provisions of an act of the general assembly of Ohio, declared by the District Court to be repugnant to the provisions of the Constitution of the United States, we think it is manifest that the final decree, rendered by the court below on the merits, is one from which a direct appeal lies to this court.

Respectfully submitted.

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